

EXHIBIT G

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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 ARGENT CLASSIC
12 CONVERTIBLE ARBITRAGE
FUND L.P., individually and on
behalf of all others similarly situated,

13 Plaintiff,

14 v.

15 COUNTRYWIDE FINANCIAL
16 CORPORATION, et al.,

17 Defendants.
18

Case No. CV 07-07097 MRP (MANx)

**DEFENDANT BANK OF AMERICA
CORPORATION'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS THE THIRD
AMENDED CLASS ACTION
COMPLAINT**

Date: March 16, 2009

Time: 10:00 a.m.

Courtroom: 12

Judge: The Hon. Mariana R. Pfaelzer

1 In its Third Amended Complaint (“TAC”) in this action, Plaintiff for the first
 2 time named Bank of America Corporation as a defendant without alleging any BAC
 3 act or conduct to support the claims against it. There is therefore no basis for
 4 naming BAC in this case, and the TAC must be dismissed as to BAC with prejudice
 5 as a matter of law.¹

6 ARGUMENT

7 BAC is not the issuer of the Debentures that are the subject of this case. Nor
 8 does the Complaint contain a single allegation of BAC wrongdoing. Even though
 9 Federal Rule 9(b) and the Private Securities Litigation Reform Act require the
 10 complaint to allege with particularity each defendant’s role in the alleged fraud, the
 11 TAC does not allege a single allegedly actionable misstatement by BAC, any BAC
 12 role whatsoever in Countrywide Financial Corporation’s (“Countrywide”) alleged
 13 misconduct, or any other BAC act or conduct that allegedly violated the federal
 14 securities laws or state law. Rather—by Plaintiff’s explicit admission—BAC “is
 15 sued herein in its capacity as the parent and successor-in-interest to Countrywide.”
 16 TAC ¶ 24. Yet the TAC itself also concedes that the transaction through which
 17 BAC became Countrywide’s parent corporation (the “Acquisition”) closed in July
 18 2008, many months after Countrywide’s supposed fraud had allegedly come to light
 19 and the putative class period’s November 27, 2007 end date. *See id.*

20 Plaintiff now seeks to hold BAC liable for Countrywide’s alleged pre-Merger
 21 wrongdoing because it acquired Countrywide in a transaction in which
 22 Countrywide merged into a BAC subsidiary. Apart from allegations concerning the
 23 merger and a passing reference to BAC’s relationship to Banc of America
 24 Securities, LLC,² the TAC is silent as to BAC. As a matter of law, however,

25 ¹ In addition to the reasons for dismissal addressed in this memorandum, BAC also
 26 joins in and incorporates herein by reference the additional arguments for dismissal
 27 set forth in the motions to dismiss and supporting memoranda of law filed by
 28 Countrywide Financial Corporation and by the Individual Defendants. Unless
 otherwise specified, capitalized terms shall have the meaning ascribed to them in
 those motions.

² The TAC alleges that BAC is the “parent corporation of Bank of America

Countrywide's July 1, 2008 merger into a BAC subsidiary provides no basis whatsoever for naming BAC, particularly in a purported class action where the proposed class period ends seven months earlier.

"[A] parent is not liable for the [allegedly] wrongful conduct of its subsidiary simply because the parent wholly-owns the subsidiary." *Bell Atlantic Bus. Sys. v. Hitachi Data Sys. Corp.*, 1995 WL 32864, at *4 (N.D. Cal. Jan. 23, 1995). As the district court in *Winner Chevrolet, Inc. v. Universal Underwriters Ins. Co.*, 2008 WL 2693741 (E.D. Cal. July 1, 2008), observed, this principle is "deeply ingrained in our economic and legal systems." *Id.* at *2 (citing *United States v. Bestfoods*, 524 U.S. 51, 61 (1998)); accord *Chill v. General Elec. Co.*, 101 F.3d 263, 268 (2d Cir.1996) (dismissing securities fraud claims against parent corporation; "whether a subsidiary defrauded plaintiffs and whether its parent . . . defrauded plaintiffs are different questions").

In re McKesson HBOC, Inc. Sec. Litig., 126 F. Supp.2d 1248, 1277 (N.D. Cal. 2000), illustrates this principle. In a transaction structured like the BAC's Countrywide acquisition, HBO & Company ("HBOC") merged into a wholly-owned McKesson subsidiary. *Id.* at 1276-77. Following the merger's closing, McKesson restated its historic financial results after it discovered that pre-merger HBOC had improperly booked contingent transactions as sales. Plaintiff sued HBOC for violating Securities Exchange Act Section 10(b) and Rule 10b-5 and also named McKesson based on, among other things, the allegation that McKesson was HBOC's parent and "successor." *Id.* at 1276. Rejecting the very same argument Plaintiff appears to be making here, the district court held that "[a] parent is not vicariously liable for the [alleged] securities fraud of its subsidiary." *Id.* Rather,

Securities, LLC" ("BAS"), which was allegedly part of the "joint book running syndicate" that sold the Countrywide debentures at issue in this case and purportedly a "market maker" for the Debentures. TAC ¶ 25. But the TAC does not even name BAS or any of the other alleged joint bookrunning syndicate members, nor does the TAC allege that BAC did anything improper (let alone engaged in any wrongdoing) as result of its ownership of BAS.

1 the district court stated that plaintiff was required to allege a securities law violation
2 by McKesson itself in order to name it as a defendant in the case. *Id.* (citing *Chill*
3 *v. General Elec. Co.*, 101 F.3d 263, 268 (2d Cir.1996)); *see also Morgan v. Power*
4 *Timber Co.*, 367 F. Supp. 2d 1032, 1035 (S.D. Miss. 2005) (observing that the
5 “applicable law is clear that a parent corporation is not responsible for the pre-
6 acquisition liabilities of its wholly-owned subsidiary”) (internal quotations
7 omitted); *Binder v. Bristol-Myers Squibb, Co.*, 184 F. Supp. 2d 762, 768-69 (N.D.
8 Ill. 2001) (finding a parent corporation not liable for its subsidiary’s premerger
9 acts).

10 Like the acquiring corporation in *McKesson*, BAC has no potential liability
11 here for the supposed securities law violations of another corporation that allegedly
12 occurred many months before BAC’s acquisition. Because Plaintiff has not alleged
13 any securities law violation or other misconduct whatsoever that would provide a
14 basis for naming BAC in this case, the TAC must be dismissed against BAC with
15 prejudice as a matter of law.

16 In any event, the TAC is defective as a matter of law and should be dismissed
17 for the reasons in the Countrywide Financial Corporation and the Individual
18 Defendants’ motions to dismiss the Third Amended Complaint, which BAC joins.

19 Dated: January 6, 2009

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